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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 105.

LAVERNE SLAGLE,
OLGA PERRY,
ROSE MLADAJAN,
EULA ANN COOPER,
PAUL BOHUS,
Appellants,

vs.

STATE OF OHIO,
Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF FOR APPELLANTS.

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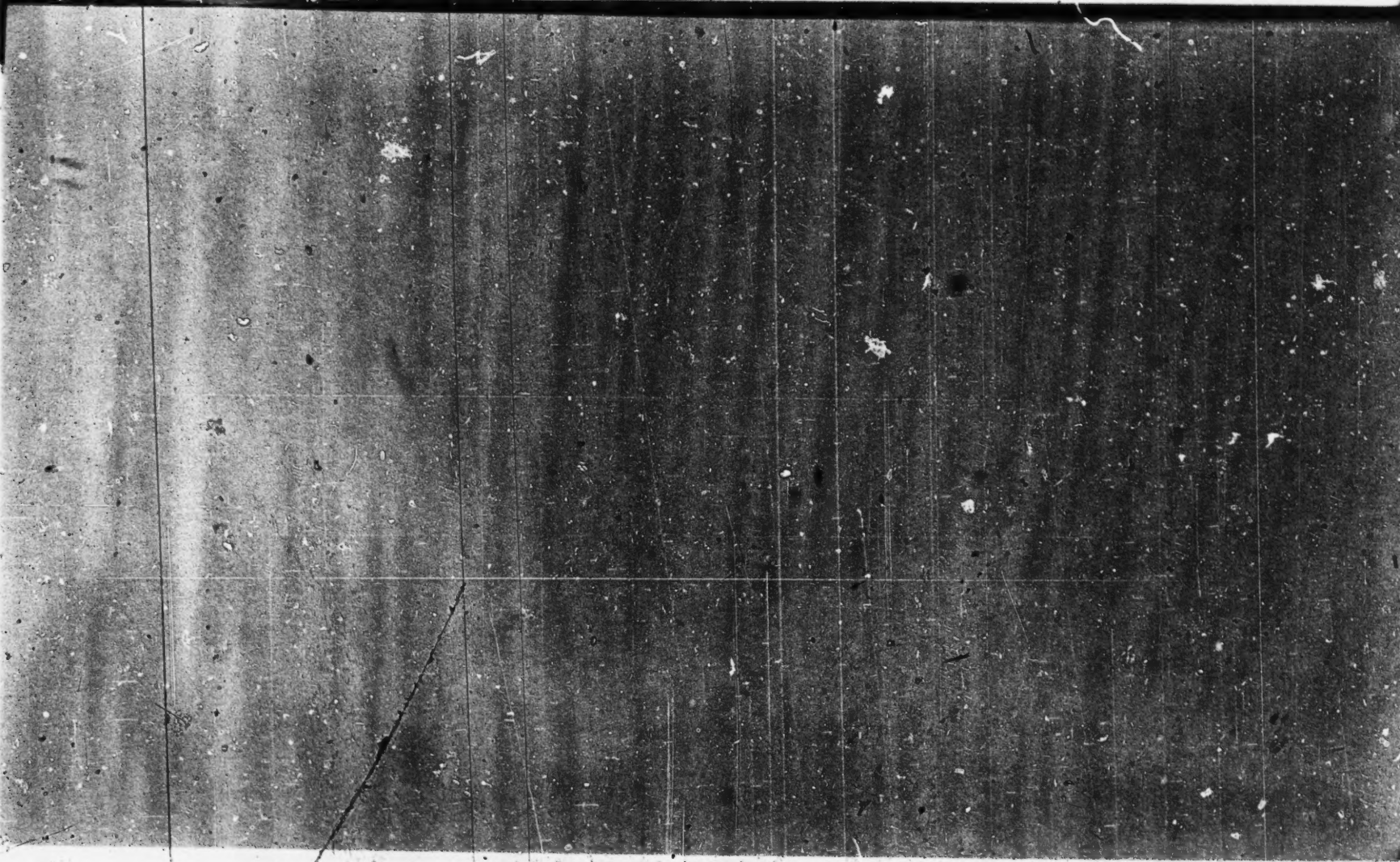

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Appellants,

vs.

STATE OF OHIO,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF FOR APPELLANTS.

OPINIONS BELOW.

Appellants were tried without a jury, February 28, 1955, Judge Weber, of the Court of Common Pleas of Stark County, Ohio, rendered his decision on March 30, 1955, together with a written opinion (R. 188-194). The Court of Appeals of Stark County, Ohio, unanimously affirmed the judgment with a written opinion May 16, 1958 (R. 196-198). Journal Entry was filed by the Court of Appeals of Stark County, Ohio, June 6, 1958 (R. 199). None of these opinions is reported.

The Ohio Supreme Court without opinion overruled the Appellants Motion for an Order directing the Court of Appeals of Stark County, Ohio to Certify its Record on December 23, 1959 (R. 203), and also without opinion dismissed sua sponte the Appellants' appeal filed as of right

for the reason no debatable constitutional question was involved on December 23, 1959, (R. 203-204). Reported in 170 O. S. 216, 163 N. E. (2d) 177.

JURISDICTION.

The judgment of the Supreme Court of the State of Ohio was entered December 23, 1959 (R. 203-204). Appellants' application for rehearing was denied on January 13, 1960 (R. 209). The notice of appeal to this Court was filed in Supreme Court of Ohio on April 11, 1960 (R. 209-212). On October 10, 1960, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 212).

The jurisdiction of this Court rests on 28 U. S. C. Sec. 1257 (2).

This Court has jurisdiction to hear an appeal testing the constitutionality of a state statute establishing a legislative investigation committee in the field of "subversive activities." *Uphaus v. Wyman*, Oct. Term 1958, No. 34, 356 U. S. 926.

This Court has jurisdiction to hear an appeal testing the constitutionality of a state statute or constitutional provision abridging First and Fourteenth Amendment freedom of thought and association by coercing persons into refraining from proscribed speech and association. *Speiser v. Randall*, 357 U. S. 513; *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U. S. 449.

This Court has jurisdiction to hear an appeal testing whether the method established in a state statute or constitutional provision for determining the political beliefs and affiliations of a person is fair or whether it constitutes a denial of due process of law under the Fourteenth Amendment. *Speiser v. Randall*, cited *supra*, at 520.

This Court has jurisdiction to review convictions for contempt of state legislative investigating committees in order to determine whether a witness was deprived of due process of law under the Fourteenth Amendment. *Sweezy v. New Hampshire by Wyman*, 354 U. S. 234, *Raley v. Ohio*, 360 U. S. 423.

And this Court has jurisdiction to determine whether the separation of the power of a state legislature to conduct investigations from the responsibility to direct the use of that power causes a deprivation of the constitutional rights of individual witnesses and a denial of due process under the Fourteenth Amendment. *Sweezy v. New Hampshire by Wyman*, cited *supra*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

United States Constitution:

Article I, Section 8, Sub-section (1)

"The Congress shall have power:

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;"

Article I, Section 10, Sub-section (1)

"No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Article II, Section 2, Sub-section (1)

"The President shall be commander in chief of the army and navy of the United States, and of the militia

of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

Article VI, Sub-section (2)

"Supremacy of the National Government

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Constitution:

Article I Section 10 provides in part:

"* * * no person shall be compelled, in any criminal case to be a witness against himself; * * *"

Ohio Statutes:

Ohio Revised Code Section 103.31-103.38 provides:

"Section 103.31 UN-AMERICAN ACTIVITIES COMMISSION.

There is hereby created an un-American activities commission in the legislative branch of the government, consisting of six members of the senate and six members of the house of representatives, resectively. The president pro tempore of the senate and the speaker of the house of representatives shall be members and shall appoint as members of the commission five additional members in each house, not more than three of whom shall be members of the same political party. When a vacancy of the membership of the commission occurs it shall be filled in the same manner as the original appointments.

Section 103.32 ORGANIZATION.

The un-American activities commission shall organize by selecting from its membership a chairman, a vice-chairman, and a secretary. The members of the commission shall serve without compensation but

shall be reimbursed for their actual and necessary expenses incurred in the discharge of their official duties.

Section 103.33 LEGAL DIRECTOR AND ASSISTANTS.

The un-American activities commission shall employ and fix the compensation of a legal director who shall employ, with the approval of the commission, such assistants, stenographers, and clerks, and engage the services of such professional investigators or technical advisors as the commission deems necessary to carry out the objects and purposes of section 103.34 of the Revised Code.

The salaries and all expenses incurred by the commission shall be paid from the state treasury upon the warrant of the auditor of state by voucher approved by its chairman.

Section 103.34 POWERS AND DUTIES.

The un-American activities commission shall:

(A) Investigate, study, and analyze:

(1) All facts relating to the activities of persons, groups, and organizations whose membership includes persons who have as their objective or may be suspected of having as their objective the overthrow or reform of our constitutional governments by fraud, force, violence, or other unlawful means;

(2) All facts concerning persons, groups, and organizations, known to be or suspected of being dominated by or giving allegiance to a foreign power or whose activities might adversely affect the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government, or the industrial potential of this state;

(3) The operation and effect of the laws of this state, of the several other states, and of the United States, which purport to outlaw and control the activities enumerated in this section and to recommend such additional legislation or revision of existing laws as may seem advisable and necessary;

(B) Maintain a liaison with any agency of the federal, state, or local governments in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage, or threats of the same.

The commission has such additional right, duties, and powers as are necessary to enable it fully to exercise those specifically set forth in this section and to accomplish its lawful objectives and purposes.

Section 103.35 POWERS OF CHAIRMAN AS TO WITNESSES.

In the discharge of any duties imposed by sections 103.31 to 103.38, inclusive, of the Revised Code, the chairman of the un-American activities commission may, throughout the state, administer oaths, issue subpoenas compelling the attendance of witnesses and the production of any papers, books, accounts, records, documents, and testimony, and cause the deposition of witnesses either residing within or without the state. In case of disobedience on the part of any person to comply with a subpoena issued on behalf of the commission or on the refusal of any person or officer to testify to any matters regarding which he may be lawfully interrogated, or to conform to section 2705.02 of the Revised Code, the chairman may be authorized by a majority of the members sitting at the time the alleged offense is committed, to cause a proceeding for contempt to be filed and prosecuted in the court of common pleas of any county under sections 2705.03 to 2705.09, inclusive, of the Revised Code. Each witness appearing before the commission by its order, other than a state official or employee, shall receive such compensation as the commission directs and mileage in the amounts provided by section 2335.08 of the Revised Code. Fees shall be authorized and paid after a notation has been made on the proper voucher sworn to by such witness and approved by the chairman of the commission.

Section 103.36. STUDIES MAY BE REQUIRED TO BE SUBMITTED.

Each officer, board, commission, or department of the state government or of any local government shall make such studies as the un-American activities commission requires within the limitations of its budget and shall furnish the commission all such assistance, information, records, and documents as it requires for the accomplishment of its duties. Reports and recommendations resulting from such studies shall be presented to the commission at least within sixty days prior to the regular session of the 100th General Assembly.

The commission may require the services of the bureau of code revision, judicial council, legislative reference bureau, legislative research commission, the Ohio program commission, and such other departments and agencies as it deems necessary to prepare a program of legislation as provided by section 103.34 of the Revised Code.

Section 103.37 MEETING; SUBCOMMITTEES.

The un-American activities commission shall meet as often as is necessary to perform its duties, provided that in any event it shall meet at least once each quarter. Five members constitute a quorum, and the majority thereof have authority to act on matters within the jurisdiction of the commission. The commission shall formulate such rules of procedure and policies to be followed in the performance of its duties and functions as it deems necessary and appropriate. The chairman may appoint subcommittees, consisting of not less than three members of the commission, which shall have all the powers conferred upon the commission itself by sections 103.31 to 103.38, inclusive, of the Revised Code, and such specific duties as are assigned to them. A majority of each subcommittee constitutes a quorum. The chairman of any subcommittee has all of the powers conferred upon

the chairman of the commission by sections 103.31 to 103.38, inclusive, of the Revised Code.

Section 103.38 REPORTS.

The un-American activities commission shall keep minutes of each meeting or hearing and a record of all testimony and evidence submitted to it. It may make such reports, findings, and recommendations, based upon its investigations and studies, as it deems advisable and necessary, to the people, the members of the One Hundredth General Assembly, individually, or in any special session thereof, and to the governor. It shall complete its work by and render a final report of its activities and of its recommendations to the One Hundredth General Assembly, the governor, and the attorney general on January 31, 1954, at which time all of its records, books, documents, and other property shall be committed to the attorney general. Any member of the general assembly, the governor or the attorney general shall nave the right to attend any session of the commission, and may present his views on matters which the commission may be considering."

Ohio Revised Code Section 101.44 provides:

"Except a person who, in writing, requests permission to appear before a committee or subcommittee of the general assembly, or of either house thereof, or who, in writing, waives the rights, privileges, and immunities granted by this section, the testimony of a witness examined before a committee or subcommittee shall not be used as evidence in a criminal proceeding against such witness, nor shall a person be prosecuted or subjected to a penalty or forfeiture on account of a transaction, matter, or thing, concerning which he testifies, or produces evidence. This section does not exempt a witness from the penalties for perjury."

Ohio Revised Code, section 2705.03. Hearing.

"In cases under section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of the court, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel. This section does not prevent the court from issuing process to bring the accused into court, or from holding him in custody, pending such proceedings."

Ohio Revised Code section 2705.05. Trial.

"Upon the day fixed for the trial in a contempt proceeding the court shall investigate the charge, and hear any answer or testimony which the accused makes or offers.

"The court shall then determine whether the accused is guilty of the contempt charge. If it is found that he is guilty, he may be fined not more than five hundred dollars or imprisoned not more than ten days, or both."

QUESTIONS PRESENTED.

(1) Whether the statute establishing the Un-American Activities Commission of Ohio is repugnant to the United States Constitution because:

(a) The state has no power to act in national and international affairs, or in the field of subversion, which Congress has fully occupied;

(b) The Commission's investigation of the political beliefs, associations and activities of private citizens necessarily abridged their constitutionally protected freedoms;

(c) The requirement that the Commission "disclose" all persons and groups having certain objectives serves no valid legislative purpose and pins a "badge of disloyalty" on individuals, without due process of law;

(d) The language of the statute is vague;

(e) The vague grant of authority to the Commission made it impossible for a reviewing court to judge whether the Commission had ranged outside the area committed to it by its parent assembly, and insulated the Assembly from the witnesses subjected to the sanctions of compulsory process.

(2) Whether the Ohio immunity act, as interpreted by the Supreme Court of Ohio, is repugnant to the United States Constitution because:

(a) The act displaces the right of a witness to refuse to answer questions on the ground of self-incrimination when the answers could become the basis for prosecution in the federal jurisdiction, which is coterminous with state jurisdiction;

(b) The act, as interpreted and applied, permits a witness to be convicted of contempt for refusal to answer questions which he was not directed to answer, and without instructing him that he is clothed with immunity from state prosecution;

(3) Whether appellants were denied due process of law under the Fourteenth Amendment by conviction for wilful refusal to answer questions pertinent to the matter under inquiry, when:

(a) The evidence does not support a finding that appellants wilfully refused to answer the questions;

(b) The evidence does not support a finding that the questions asked were pertinent to the matter under inquiry.

STATEMENT OF THE CASE.

On the 21st day of October, 1953, these appellants appeared before the Ohio Un-American Activities Commission in obedience to subpoenas served upon them.

The hearing before said Commission was held in the Stark County Court House in open session.

Each appellant was represented by counsel, and upon advice of counsel each appellant declined (upon constitutional grounds) to answer some of the questions propounded to them; and upon advice of counsel each of the appellants **did answer** some of the questions propounded to them.

On the 24th day of December, 1953, each of the appellants were indicted ten (10) counts each by the Stark County Grand Jury, each count based upon a question that appellant had declined to answer. (R. 1-31.)

On March 19, 1954, the trial court sustained a demurrer of the appellants and dismissed said indictments. Said decision was appealed to the Stark County Court of Appeals, and on November 2, 1954, the decision of the lower court was reversed and the causes were remanded to said court for further proceedings, according to law. Thereafter the Ohio Supreme Court refused to certify.

The appellants proceeded to trial, having waived their right to jury trial. On the 30th day of March, 1955, the trial court found each of the appellants guilty on various counts of the individual indictments and sentenced each appellant to imprisonment in jail for ten (10) days and to pay a fine of Five Hundred Dollars ($500.00) on each count of which they were convicted; the jail sentences, however, running concurrently and the fines other than the first one being remitted (R. 192-194) the trial court suspended execution of sentence and set an appeal bond of One Thousand Dollars ($1,000.00) for each appellant pending the within appeal.

The appellants did not actually refuse to answer but the record shows that they claimed the privilege of the Fifth Amendment to the Constitution of the United States and a similar provision of the Constitution of Ohio (*supra*, pages 4, 9); that a person cannot be compelled

to be a witness against himself. These responses to the questions asked by the Commission were made by the appellants upon advice of counsel as is shown by the record. (R. 87-187.)

The record (R. 87-187) shows that in only two instances was an appellant confronted with the clear decision of continuing to invoke his privilege or testing his right to such on a contempt proceedings (Olga Perry, R. 91, and Eula Ann Cooper, R 130, 134, 135). In all other instances the Commission *did not press* for an answer.

When the 100th General Assembly of the State of Ohio duly passed the Act known as The Devine-Bauer Bill No. 308, Ohio Revised Code, sections 2921.21, 2921.27 etc., relative to the investigation and control of subversive activities the authority of the Commission had been completely exercised. Said Act was duly passed over the Governor's veto on August 7, 1953. And said asembly adjourned sine die August 7, 1953. (O. R. C. sec. 103.38, *supra*, p. 9.)

The interrogation of the appellants took place in October, 1953, and since the 100th General Assembly was no longer functioning there was no reason for the commission to continue its hearings; inasmuch as its reports and recommendations had been received and acted upon by the 100th General Assembly as required by O. R. C. sec. 103.38.

During the cross-examination of Samuel L. Devine, Chairman of the Commission by Mr. Hilton, appellants counsel in the Stark County Common Pleas Court, the chairman admitted the recommended legislation had been enacted prior to the hearing date in Canton, Ohio (R. 45, 46).

The new statutes provided that the attorney general should appoint special assistants to investigate subversive

activities and that said special assistants may testify before any grand jury as to information he may have as a result of his investigations. Ohio Revised Code, section 2921.27 provided that any information acquired pursuant to Ohio Revised Code sections 2921.21 to 2921.27 inclusive which reflected on the loyalty of any resident of the United States could not be made public, except by permission of the Attorney General, or unless such resident had been indicted under the criminal law of Ohio or some other jurisdiction.

Shortly after Ohio Revised Code sections 2921.21 to 2921.27 were enacted the Ohio Attorney General ruled that the sections were unenforceable.

The statutes under which the indictments were drawn and under which the appellants were tried, convicted and sentenced are Ohio Revised Code Sections 2705.03 and 2705.05 (*supra* page 10).

The Court of Appeals of Stark County, Ohio, unanimously affirmed the conviction by a written opinion (R. 196-198).

The Ohio Supreme Court refused to certify and dismissed the appeal as of right without opinion. (R. 203-204.) Appellants' application for rehearing was denied. (R. 203-204.) On October 10, 1960, this Court noted probable jurisdiction and postponed further consideration of the question of jurisdiction to the hearing on the merits.

SUMMARY OF ARGUMENT.

I.

This case is similar to *Watkins v. United States* and *Sweezy v. New Hampshire*, and has precisely the same issues as *Raley v. Ohio*. The act establishing the un-American Activities Commission of Ohio is repugnant to the United States Constitution in several respects.

It is legislation in the field of "sedition," a field in which Congressional action has superseded state action, and it touches upon foreign affairs, a field in which federal power is exclusive and supreme.

It provides for investigations into the political beliefs, activities, and associations of persons in private life which can serve no valid legislative purpose, and which necessarily abridge the witnesses' First Amendment rights.

It requires the "disclosure" of persons and groups holding dissident political beliefs, with the threat of prosecution by the state or federal governments under sedition laws, but without a fair procedure for determining who falls into the category of "un-American," and with no valid legislative purpose, and therefore constitutes a denial of due process under the Fourteenth Amendment.

In addition, the language of the statute is too vague to meet due process standards, as was the similar language in *Sweezy* and *Watkins*.

Lastly, the vague grant of authority to the Commission gives no clear indication of the Assembly's interest in the information obtained at the hearings, and constitutes a denial of due process because it permits a complete separation of the Assembly's responsibility in this field from the operation of the Commission.

II.

The Ohio immunity act, as interpreted by the Ohio Supreme Court in this case, is repugnant to the United States Constitution because it requires a witness to answer questions which might incriminate him, without affording him protection sufficient to eliminate the threat of prosecution. When immunity is granted, a witness could not be prosecuted by the state. But he could still be prosecuted by the federal government. The threat of federal prosecu-

tion in this field of sedition is real and imminent. This is a field in which state and federal governments have been working together, and concurrent prosecutions by state and federal officials against the same individuals have occurred. This threat is made explicit in the statute establishing the said Commission, which requires that state officials cooperate with federal officials.

In addition, this immunity act, as interpreted and applied by the Ohio Supreme Court, permits convictions for contempt in the absence of directions to answer, and without knowledge on the part of the witness that the immunity act offers any protection against prosecution. This clearly denies due process of law.

III.

Appellants were denied due process of law under the Fourteenth Amendment by their convictions for wilful refusal to answer questions pertinent to the matter under inquiry, because their actions were no wilful refusals to answer, but proper claims of the privilege against self-incrimination as to questions which had a tendency to incriminate them in state and federal jurisdictions. The questioning body acquiesced in their claims of the privilege. This was indicated by the failure to direct the witnesses to answer the questions, after their original refusal, except in two instances.

The problems of pertinency raised in the *Watkins* and *Sweezy* cases are inherent in any investigations in the field of "un-American activities," and arose in the instant case because the witnesses were not informed of the purpose for which the hearing was called. Nor was there any guide by which they could determine, during the hearing, whether the specific questions asked were pertinent to any valid legislative purpose, since the statutory language is as vague as in *Watkins* and *Sweezy*.

ARGUMENT.

I.

THE STATUTE ESTABLISHING THE COMMISSION IS REPUGNANT TO THE UNITED STATES CONSTITUTION.

A. The State has no power to act in national and international affairs, or in the field of subversion, which Congress has fully occupied.

Appellants were subpoenaed pursuant to a statute establishing the Un-American Activities Commission whose stated purposes included, *inter alia*: investigations of persons and groups "dominated by or giving allegiance to *a foreign power*" or whose activities might adversely affect Ohio's contribution to *"the national defense,* * * * the functioning of any agency of the * * * *national government* or the industrial potential of this state"; to assist in the revision of *federal* sedition statutes; to "maintain liaison with any agency of the *federal* * * * *government*[s] *in devising and promoting means of disclosing* those persons and groups who seek to alter or destroy *the government* of this state or *of the United States* by force, violence, intimidation, sabotage or threats of the same." (Emphasis supplied.) Ohio Revised Code, Sec. 103.34(1)(a), (b), (c).

This Court has recognized that, in the twentieth century, seditious activity is a national problem, and is not directed against any single state. *Pennsylvania v. Nelson*, 350 U. S. 497. This statute makes this fact explicit.

The Constitution of the United States provides that the federal government shall have exclusive jurisdiction over the conduct of foreign affairs (Art. I, Secs. 8, 10; Art. II, Sec. 2) and over the protection of the federal government from invasions and insurrections (Art. I, Sec. 8). The statute which established the Ohio Commission gave it the power and duty to investigate activities in these

areas. Such provisions clearly contravene the federal Constitution.

This Court has held, in addition, "the Congress has intended to occupy the field of sedition. Taken as a whole, [the acts of Congress] * * * evince a Congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore a state sedition statute is superseded regardless of whether it purports to supplement the federal law." *Pennsylvania v. Nelson*, 350 U. S. 497, at 481.

The legislature of Ohio therefore could not pass a valid state sedition statute.

The act establishing the un-American Activities Commission was invalid for two reasons:

First, it operated as a state sedition statute. The method of enforcing this statute was through subpoenaing witnesses to appear at public hearings, asking questions concerning their own and other people's political activities and actions which might be "subversive" in the eyes of the Commission, disclosing the names of the witnesses to the public, and to other state and federal agencies. (See discussion on "disclosing" *infra*, at point I.c.)

Second, the act required the Commission to seek information which would be helpful in drafting additional statutes in the field of sedition for presentation to the Ohio General Assembly for passage. But, as this Court has explained, "* * * these [investigating committees] are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere." *Watkins v. United States*, 354 U. S., at 205-6. Since sedition does not fall within the state legislative sphere, this statutory grant of authority to the Commission was also invalid.

When William B. Saxbe, co-author of legislation establishing the predecessor of the Commission, became Attorney General of Ohio in 1957, he recognized that this Court's decision in the *Nelson* case "said that Pennsylvania did not have the authority to enter the field of investigation of Un-American Activities, even though the statute had not said so, Congress had pre-empted the field. That ended the program in Pennsylvania, Ohio and a great many other states." *

Since the Assembly could not pass any valid statutes in this field already occupied by Congress, and limited to the federal government by the federal Constitution, the hearings had no valid legislative purpose and the statute authorizing such hearings was repugnant to the federal Constitution.

B. The Commission is given statutory authority to investigate the political beliefs, associations and activities of private citizens, thus abridging their constitutionally protected freedoms.

For lawyers accustomed to qualifying clauses, it is refreshing occasionally to read the First Amendment in the naked form in which it was written: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Since this Court's wise and necessary decision that the First Amendment guarantee of rights is implicit in the Fourteenth Amendment as against state action, *Palko v.*

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* William B. Saxbe, Address to the Columbus and Akron Bar Associations, 47 The Ohio Bar 1041, 1043, December 9, 1957.

Connecticut, 302 U. S. 319, at 325, citizens of state and nation have been encouraged to practice these freedoms. The Ohio Constitution also contains strong provisions concerning freedom of speech, press and assembly. (See Ohio Constitution, Article I, Sections 1, 2, 3 and 11.)

When these freedoms are consistently circumscribed by investigations and threats of jail for contempt, the need for the freedoms does not diminish and the fight to restore and maintain the First Amendment does not cease. But few dare exercise their rights, particularly the right to think thoughts which may prove dangerous to the existing order of things—whether in science or psychology or political theory. Yet the future of our society depends upon these new thoughts.

This Court has more recently described the effect of a state order requiring the disclosure of the names of members of an organization:

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. * * *" *N. A. A. C. P. v. Alabama*, 357 U. S. 449, at 460-62.

This Court is aware of the effect upon a person's ability to earn a living, his family, his status in the community merely from the receipt of a subpoena to appear before a committee investigating "un-American activities." *Wat-*

kins v. United States, 354 U. S., at 197. In *Speiser v. Randall*, this Court found that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." 357 U. S. 513 at 519.

A statute which has as its purpose the summoning of witnesses to appear, against their will, to be questioned about their political beliefs, associations and affiliations by an agency of the state with power to jail them for contempt is clearly repugnant to the First and Fourteenth Amendments.

In addition, this statute on its face would cause law-abiding citizens of Ohio to question their right to believe in various types of governmental reform, and their right to advocate such reforms. The section requiring the Commission to investigate all persons and organizations "whose activities might adversely affect * * * the industrial potential of the state" certainly contains a threat to the free exercise of constitutionally-protected rights by trade unions in every industry in the State of Ohio.

This Court held, in *Watkins*:

> "* * * Clearly, an investigation a subject to the command that the Congress shall make no law abridging freedom of speech press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless, an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by law-making." 354 U. S., at 197.

But here there is a statute to be reviewed. The statute establishing the Commission is itself repugnant to the First and Fourteenth Amendments.

One other First Amendment problem must be mentioned. The concept of "balancing contending principles" where First Amendment questions arise cannot be found in the wording of the Amendment or in the correspondence of its framers. But Ohio, like New Hampshire, apparently felt the need to be informed on the "elemental subject of self-preservation." This Court, balancing this State need against the rights of a witness, stated in 1957 that it did "not now conceive of any circumstances wherein a state interest would justify infringement of rights in these fields," i.e., the fields of freedom of association and thought, including unorthodox and dissenting thought. *Sweezy v. New Hampshire*, 354 U. S., at 251. Appellant believes that the same circumstances existed in 1953 at the time of this hearing in Ohio and that the state has made no showing to the contrary.

For all of these First Amendment reasons, the statute establishing the Commission is repugnant to the United States Constitution.

C. The statutory requirement that the Commission "disclose" all persons and groups having certain objectives serves no valid legislative purpose and pins a "badge of disloyalty" on individuals without due process of law.

The statute establishing the Commission requires it to maintain a liaison with agencies of the federal, state, and local governments "in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage or threats of the same. * * *" Sec. 103.34(2).

It is commendable that the Commission itself became sensitive to the violations of due process inherent in its

procedures. Nor could the "disclosure" of persons serve a valid legislative purpose. In performing its function of initiating bills, and amending and repealing statutes, a legislature may need the information gained through legislative committee hearings. But a legislature does not need and cannot use information about the beliefs and activities of specific individuals while the constitutional prohibition against bills of attainder stands.

Clearly a legislative body has no power to disclose the names of persons as being "subversive" or "disloyal." As this Court stated recently: "We have no doubt that there is no congressional power to expose for the sake of exposure." There is "no general power to expose where the predominant result can only be an invasion of the private rights of individuals." *Watkins v. United States*, 354 U. S., at 200.

Under the Constitution and the Anglo-American concept of due process of law, an individual cannot be found guilty of crime unless certain procedures are followed. No agency of government can "disclose" that an individual has committed a crime until there has been an indictment or information, arraignment, trial, verdict, and opportunity for appeal. And each of these steps in the criminal procedure must be taken according to certain rules which protect the individual from the likelihood of conviction if, in fact, he is innocent.

It is obvious that a hearing before a legislative fact finding committee does not provide the procedural safeguards surrounding a defendant in a criminal case. There is no clear and concise statement of the charges against the witness in advance of the hearing; there are no rules of evidence in the hearing, such as the right to effective advice of counsel of the type required in criminal cases, the right to confrontation of opposing witnesses, and cross-

examination. Nor is there a right to be heard by a jury of one's peers, or for a determination by a person sitting as an objective, disinterested judge. There is no effective appeal from the "verdict" of the legislative Commission. There is, instead, "conviction" by questioning, and immediate disclosure of "guilt."

This Court has held that all hearings in the field of "un-American activities" restrain speech. The comments in *Speiser v. Randall* are therefore applicable here:

> "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the fact-finder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights. * * * When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford. * * *" 357 U. S., at 520.

The statute was invalid for the additional reason that it did not require "the necessary element of guilty knowledge" by the witness before he was subpoenaed and ques-

tioned and "disclosed" as "un-American." *Wieman v. Updegraf*, 344 U. S. 183.

It is of interest that the Attorney General of Ohio read with care, and with approval, this Court's decisions at the end of the 1956 October Term, and concluded:

> "* * * Notice that the error which has been the grounds for reversal in nearly all of [the cases discussed, including *Watkins, Sweezy, Yates, Jencks, et al.*] has been procedural error—either in the apprehension or trial of the offenders. The court is saying now that the threat of Communism has abated and that the doctrine of clear and present danger will not be heard in court. If you are going to catch a Communist, you must do it by the rules. Whether by means of a Congressional investigation, Attorney General's action, or however, it's no longer on a catch as catch can basis—but must be done strictly according to law and procedure. * * *
>
> "There is little logic in depriving liberty out of alleged necessity to prevent a similar deprivation later on. I think the interest of the court is to follow what the people want and expect today, namely, protection and preservation of civil liberties. * * *". William B. Saxbe, then Attorney General of Ohio, 47 Ohio Bar, at 1046-7.

The language of the statute establishing the un-American Activities Commission of Ohio makes necessary a finding that it is repugnant to the Federal Constitution.

D. The statute is invalid because of its vague language.

The authority given to the Ohio Commission was "broadly drafted and loosely worded," it provided a "sweeping mandate" to the Commission without properly stating the limits on the scope of the Commission's inquiry. The vice of vagueness found in the mandates of the House

Un-American Activities Committee, in *Watkins*, and of the Attorney General of New Hampshire, in *Sweezy*, are equally present here.

The Ohio Commission was directed to investigate "*all* facts relating to the activities of persons, groups, and organizations whose membership includes persons who have as their objective or *may be suspected of having* as their objective the overthrow or *reform* of our constitutional governments by fraud, force, violence, *or other unlawful means*; all facts concerning persons, groups and organizations, known to be or *suspected of being dominated by* or *giving allegiance to* a foreign power or whose activities might *adversely affect* the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government or *the industrial potential of this state*; * * *" Sec. 103.34 Rev. Code.

Counsel could not define the italicized words and phrases, nor could appellant. Neither the legislature of Ohio nor the Ohio Commission nor the Ohio Supreme Court have defined these words and phrases with the degree of explicitness needed to meet due process requirements in a statute providing a criminal penalty for failure to answer questions.

Further, the statute contains no differentiation between "knowing" and "innocent" association or activity. *Wieman v. Updegraf, supra.*

E. The vague statutory grant of authority to the Commission made it impossible for a reviewing court to judge whether the Commission had ranged outside the area committed to it by its parent Assembly, and insulated the Assembly from the witnesses subjected to the sanction of compulsory process.

This Court, in its decisions in *Sweezy* and *Watkins*, considered at some length the proper wording of a grant of authority to a state or federal legislative investigating body, and the proper scope of its inquiry. The Court also considered the separation of the authority of the legislature to obtain information from the actual workings of the creature established by the legislature for this purpose. *Sweezy v. New Hampshire*, 354 U. S., at 245-7; *Watkins v. United States*, 354 U. S., at 201, 205-6.

The grant of authority to the Ohio Commission contained all of the evils mentioned in these two opinions, as a reading of Sec. 103.34 Rev. Code indicates.

In addition, the Ohio Commission did not question these appellants until after the *sine die* adjournment of the 100th General Assembly. And a witness who declined to answer questions before the Commission could be indicted for contempt without any action by the Assembly, or by a reviewing magistrate. In Congress, a contempt citation must be voted by the investigating committee, and approved by the entire House before an indictment can be drawn. (See *Watkins v. United States*, cited *supra*.) In New Hampshire, the witness who refused to answer questions asked by the attorney general acting as a legislative investigating committee was called before a judge, who decided whether such questions must be answered. The "committee" did not make the final determination that a contempt citation should be drawn. (See *Sweezy v. New Hampshire*, cited *supra*.)

The legislature in effect told the Ohio Commission to screen the citizenry of Ohio to bring to light anyone who fitted into the expansive statutory definitions. *Sweezy v. New Hampshire, supra,* at 253; *Watkins v. United States, supra,* at 204-5.

Appellants also contended that the Ohio General Assembly had delegated to the Commission the task of separating the classes of information deemed desirable, in the light of the legislature's object, from the information it could not validly acquire without infringement of the constitutional rights of the witnesses.

II.

THE IMMUNITY ACT, AS INTERPRETED BY THE SUPREME COURT OF OHIO, IS REPUGNANT TO THE UNITED STATES CONSTITUTION.

The Ohio immunity act, Sec. 101.44 Rev. Code, is a broad statute, within the meaning of the decision in *Counselman v. Hitchcock,* 142 U. S. 547. It provides that the "testimony * * * shall not be used as evidence in a criminal proceeding against him, nor shall a person be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter or thing, concerning which he so testifies, * * *" The language is almost identical with the language in the federal Immunity Act of 1954 passed upon by this Court in *Ullmann v. United States,* 350 U. S. 422, and in the New York immunity act passed upon by this Court in *Knapp v. Schweitzer,* 357 U. S. 371, except that the latter use the word "any" each time the Ohio act uses the word "a."

This Court has interpreted this section of the federal act as providing immunity from all prosecutions, federal or state. *Ullmann v. United States,* cited *supra,* at 436.

Chief Justice Warren, in his concurring opinion in *Regan v. People of New York,* 349 U. S. 58, pointed out that:

> "This Court has never held that a State, in the absence of an adequate immunity statute, can punish a witness for contempt for refusing to answer self-incriminatory questions. A case involving such facts has never been presented here."

This case presents this issue. Assuming appellants were granted complete immunity from state prosecution, they were left subject to prosecution by the federal government.

A. The immunity act, as interpreted and applied, permits a witness to be convicted of contempt for refusal to answer questions which he was not directed to answer, and without instructing him that he is clothed with immunity from state prosecution.

Counsel for appellants know of no previous case before a state or federal legislative investigating body in which a conviction for contempt was sustained in the absence of a direction from a member of the investigating body to the witness to answer the question following the witness' refusal to answer.

In the *Emspak*, *Bart* and *Quinn* cases, this Court explained at some length the nature of a direction to answer, that such a direction is "supported by long-standing tradition," "has been uniformly recognized in the procedure of both state and federal courts," and is one of the "minimal procedural standards" without which "there is lacking the element of deliberateness necessary for a conviction under Sec. 192 for a refusal to answer."

> *Quinn v. United States*, 349 U. S. 155, at 167-8;
> *Emspak v. United States*, 349 U. S. 190, at 202;
> *Bart v. United States*, 349 U. S. 219, at 223.

This Court cited several early cases of contempt of state legislative bodies in which the witness, after refusal to

answer before a subcommittee or committee of the legislature, was informed in writing that the legislature had voted to direct him to answer the question, and was then summoned before the legislature, where the question was repeated and he was given an opportunity to answer.

Ex parte McCarthy, 29 Cal. 395, at 398;
People v. Keeler, 99 N. Y. 463, at 471;
Lowe v. Summers, 69 Mo. App. 637, at 645.

In the *Watkins* and *Sweezy* decisions, this Court reiterated its concern that a witness before a legislative investigating committee be informed, from moment to moment, of his position in relation to the committee. The requirement that a witness be given a clear direction to answer any question which may become the subject of a contempt citation runs parallel to the requirement that a witness "have knowledge of the subject to which the interrogation is deemed pertinent." *Watkins v. United States*, cited *supra*, at p. 21; Frankfurter, *J.*, at 217.

III.

APPELLANTS WERE DENIED DUE PROCESS OF LAW BY CONVICTION FOR WILFUL REFUSAL TO ANSWER QUESTIONS PERTINENT TO THE MATTER UNDER INQUIRY.

A. The evidence does not support a finding that appellants wilfully refused to answer the questions.

The appellants did not actually refuse to answer but the record shows that they claimed the privilege of the Fifth Amendment to the Constitution of the United States and a similar provision of the Constitution of Ohio (*supra*, pages 4, 9); that a person cannot be compelled to be a witness against himself. These responses to the questions asked by the Commission were made by the appellants upon advice of counsel as is shown by the record (R. 87-187).

Blau v. U. S., 340 U. S. 159;
Raley v. Ohio, 360 U. S. 423.

"The test is whether the witness was commanded to answer regardless. * * *" *Raley vs. Ohio, supra,* at page 444.

In the absence of such directions, no wilful refusal can be found.

There is a presumption of innocence in every criminal case. A *presumptive intent to* commit a prohibited act has no place in a case such as this. See *Morissette v. United States*, 342 U. S. 246, at 275. Regardless of the wording of the contempt statute here, it was necessary for the State to show an intention on appellants' part to defy the order of the Commission. No such showing having been made, these convictions must be reversed.

B. The evidence does not support a finding that the questions asked were pertinent to the matter under inquiry.

In the *Wakins* and *Sweezy* cases, cited *supra*, this Court has carefully spelled out the requirement of pertinency in a legislative hearing in the field of "un-American activities": (1) the witness must be informed of the purpose of the hearing at which he appears; (2) he must be informed of the pertinency of the questions he is asked to a valid legislitive purpose. The Court held that a contempt conviction cannot be based on refusal to answer questions unless such questions fall into the category of matters upon which the parent legislative body wishes to be informed. *Sweezy v. New Hampshire*, cited *supra*, 354 U. S., at 253-255; *Watkins v. United States*, cited *supra*, 354, at 205-6, 208-9.

In the instant case, the language of the statute establishing the Commission was appellants' only guide to the pertinency of the questions asked, since the chairman and counsel of the Commission made no statement concerning . .

the scope of the hearing at the opening of the session at which appellants appeared. It is clear that the witnesses, during the hearing, could not have been able to judge, with the degree of explicitness and clarity required by the due process clause, whether the questions asked were pertinent to the matter under inquiry, as set forth in the statute.

The questions, like those criticized in the *Watkins* decision, radiated outward infinitely to any topic thought to be related in some way to armed insurrection, with a probe for a depth of detail even farther removed from any basis of legislative action and involving an attempt to collect and confirm minutiae on remote topics in the past.

The trial court held that the appellants were not guilty in refusing to answer certain questions, for various reasons, such as the question being "double barrelled and improper," "too vague," "not relevant," etc. (R. 192-194.)

CONCLUSION.

The questions appellants raised in this case throughout the State Courts and which they present to this Court are precisely the same ones that were raised in the *Morgan* and *Raley* cases.

Raley v. Ohio, 360 U. S. 423 at pages 425 and 437.

For the foregoing reasons it is submitted that appellants were constitutionally protected against the compelled testimony demanded of them by the Ohio un-American activities commission, and that the judgments affirming their convictions and sentences must accordingly be reversed.

Respectfully submitted,

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